Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

SUPPLEMENTAL BRIEF OF LANDMARK COMMUNICATIONS, INC.

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June 3, 1977

IN THE

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ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

SUPPLEMENTAL BRIEF OF LANDMARK COMMUNICATIONS, INC.

This supplemental brief is submitted, pursuant to Rule 16(5) of this Court, on behalf of appellant Landmark Communications, Inc. ("Landmark"), for the purpose of calling the attention of the Court to the current status of certain litigation now under way in the federal courts in Virginia which bears upon the constitutionality of the statute in question on this appeal.

In our Jurisdictional Statement we adverted to the fact that only eight days after the decision of the Virginia Supreme Court in the instant case, Judge Robert R. Merhige, Jr., of the United States District Court for the Eastern District of Virginia, issued a temporary injunction restraining prosecution of a Virginia television station under the same section of Virginia law as that involved here (32a). That order subsequently expired under its own terms, since the litigation was not pressed.

As our Jurisdictional Statement (p. 10) also indicated, on March 31, 1977, Richmond Newspapers, Inc., the publisher of the *Richmond Times-Dispatch* and the *Richmond News Leader* was charged by the Commonwealth with violating Va. Code § 2.1-37.13. The United States District Court for the Eastern District of Virginia, on April 5, 1977, denied a temporary restraining order against the criminal prosecution. Judge D. Dortch Warriner at that time stated that although he believed the statute was unconstitutional, he could not hold the statute "was patently and flagrantly unconstitutional" in light of the decision of the Supreme Court of Virginia and thus could not enjoin a then pending criminal prosecution. *Norfolk Ledger-Star*, April 6, 1977, p. A8.

The events which have occurred since the filing of our Jurisdictional Statement on April 20, 1977 are as follows:

On April 29, 1977, Richmond Newspapers, Inc. was convicted of two violations of Va. Code § 2.1-37.13 and fined $1,000 for each violation.

On May 3, 1977, Judge Warriner, on application of Richmond Newspapers, Inc., entered a temporary restraining order lasting for ten days enjoining further criminal prosecutions against Richmond Newspapers, Inc. "under § 2.1-37.13 of the Code of Virginia, for the writing and for the publication of information relating to pending investigations of the Virginia Judicial Inquiry and Review Commission." (SB 1a).* In entering the order, Judge Warriner observed that the statute was one which prohibits publication of information that "a self-governing Commonwealth needs" and stated that "there is a grave question as to the constitutionality of this statute." (SB 5a).

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* Reference to "SB——" are to the appropriate pages of the appendix to this Supplemental Brief.

On May 12, 1977, an order was entered extending the temporary restraining order until May 21, 1977. (SB 8a).

On May 20, 1977, a preliminary injunction was entered by Judge Warriner against prosecution of Richmond Newspapers, Inc., for any alleged violations of Va. Code § 2.1-37.13 during the pendency of the action. (SB 10a). In support of his order, Judge Warriner referred to:

> "... the loss to the citizens of Virginia of the opportunity of knowing what disciplinary actions are contemplated, what investigations are being made, what is being done about bad judges. They have a right to know, and a deprivation of that right is surely as damaging to the body politic of Virginia as the inconvenience that was found in the Maynard case to warrant Federal intervention there." (SB 20a-21a).

He further observed that:

> "Surely it is newsworthy that a judge is being investigated. Surely it's newsworthy that a judge is being disciplined by reprimand, informal or otherwise. That's newsworthy. And if the newspaper doesn't print that news, then it can be said that it is printing the opposite; it is saying the opposite. And in that sense, the newspaper is being forced by the State not only to say something it doesn't want to say but to say something that isn't true and thus is misleading the citizenry." (SB 21a-22a).

• • •

Thus, the current situation in Virginia is that the Supreme Court of Virginia has held the statute in question on this appeal to be constitutional; two separate federal judges have, subsequent to that ruling, enjoined prosecu-

tion under the statute; the injunction against prosecution of Richmond Newspapers, Inc. remains in effect. That injunction does not, however, refer to prosecution in the event of publication by any other newspaper.

We believe these events, reflecting conflicting views of the federal Constitution and presenting the risk of differing treatment for similar conduct on the part of the media, add still further support to the submission in our Jurisdictional Statement that this case is surely worthy of plenary consideration by this Court. We urge the Court to note probable jurisdiction and to set this case down for oral argument as promptly as is possible.

Respectfully submitted,

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June 3, 1977

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APPENDICES

APPENDIX A

Order of May 3, 1977

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,

Plaintiff.

v.

AUBREY M. DAVIS, JR.,

Defendant.

ORDER

For the reasons stated from the bench, and in order to prevent irreparable damage to the plaintiff from threatened criminal prosecutions, as set forth fully in the plaintiff's verified Complaint, and good cause having been shown, it is hereby ORDERED that the defendant is temporarily enjoined from prosecuting the plaintiff, under § 2.1-37.13 of the Code of Virginia, for the writing and for the publication of information relating to pending investigations of the Virginia Judicial Inquiry and Review Commission. This injunction shall expire within ten days of this date, unless sooner modified, extended or dissolved.

Appendix A

This injunction becomes effective upon the posting of bond in the amount of $100.00 without surety.

ENTER:

3 May 1977

/s/ D. DORTCH WARRINER
U.S. District Judge

We ask for this.

.....
Counsel for Plaintiff

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK

By: /s/ SAMUEL I. GOLIGHTLY, JR.
SAMUEL I. GOLIGHTLY, JR.
DEPUTY CLERK

FILED IN OPEN COURT
May 3, 1977
CLERK, U.S. DIST. COURT

APPENDIX B

Transcript of May 3, 1977

The Court: I think this is a difficult question. I can easily understand that view of the General Assembly that in order to encourage people to bring charges against judges that a degree of confidentiality is desirable.

And it is generally supposed that judges are extremely powerful individuals and that if you are going to complain about them that you had better be sure you got it straight and so forth. It is sort of like the proverb if you—I forgot exactly how it goes, but something, if you strike at a tyrant, strike to kill, not simply strike to injure him.

And so one might be fearful of making complaints against a judge unless he was absolutely certain that he could get that judge off the bench, particularly a lawyer who is required to practice before him. And no one is in much better position than a lawyer to know the problems that judges may have in even-handed administration of justice; even other judges don't often sit in and hear a case being tried.

And I think it is very true that a reasonably prudent lawyer would indeed hesitate to bring any charges against a judge unless he could be assured of confidentiality in the event his charges proved to be unfounded or in the event he is unable to convince a duly constituted tribunal that his charges are well-founded.

I also am mindful of some motives that may involve not embarrassing a judge with frivolous charges against him. That one doesn't strike me as having any force. But the other one does, for the good of the body politic that persons feel no undue restraint in bringing charges against judges.

Then you have the other side of the ledger; that is, that in a self-governing commonwealth, persons have a right

to know how their servants are behaving. And, of course, judges are the servants of the people, under the law. And to shield judges from public opinion, from criticism, both just and unjust; both accurate and inaccurate; both well thought out or surface; to shield judges from any type of criticism is to create sort of a special class of judges and say that they are above the right of the citizens to know ill of them.

Then you have, of course, the freedom of the press, and I am not sure whether that is a freedom which belongs to the fourth estate or whether it's a freedom which belongs to the people. And I am not sure it makes a whole lot of difference, because if you deprive the fourth estate of the freedom of press, you are depriving the people of their freedom to know, to hear, to be misled as well as to be led, to be misinformed as well as to be informed.

But these arguments about freedom of the press took place a number of years ago, 150 or so years ago. They continue to this day. But the fundamental question was decided with the adoption of the First Amendment to the Constitution. The fundamental question is that where one attempts to place any restriction upon the freedom of the press, that that one has an extremely heavy burden to carry through.

Now, today the defendant here has argued something with respect to the law, but I don't recall any argument about the reason that the Commonwealth has this law. I suppose that perhaps the reason supplied by the Court in its opinion is as good as any. And the Court accepts that that probably is one of the reasons. There are probably others maybe even more weighty than have occurred to me, but not weighty enough to overcome the Constitutional

requirement that we make no laws restricting freedom of the press.

Now, I don't agree with Mr. Justice Black in his absolutist theories of that. But we are not in the area of absolutism when we come to question whether a law which makes it a misdemeanor to publish what amounts to criticism of judges is in the absolutist area. It's not. It's far from it.

It's in precisely that area that a self-governing commonwealth needs to have information, must have information.

We don't have the case that we had here, what was it, a month ago. In that case, Richmond Newspapers, Inc., was in the midsts of a criminal prosecution. The Supreme Court of the United States has spoken, I think, very clearly on the point that we are to interfere in our primary duty to uphold the rights of citizens under the Federal Constitution. We are to interfere in carrying out that responsibility only where the statute is flagrantly and patently unconstitutional, where the prosecution is a form of harassment and entered into in bad faith and whatever the other criteria were that I gave at that time.

Here, there is no prosecution pending. The Federal Court is not reaching into the well of a State courtroom and saying stop. We're saying nothing to any judge or jury or commonwealth's attorney or grand jury or any other body that is legally constituted for the purpose of requiring adherence to the laws of the Commonwealth. We're merely saying for purposes of a temporary restraining order there is a grave question as to the constitutionality of this statute.

There is, if it's necessary to say so, and I'm not sure that there is, a reasonable likelihood that the plaintiff will prevail. The violation of First Amendment rights inherently is great and irreparable harm. There need be no showing,

so far as I know, that one is suffering some peculiar particular irreparable and great harm. It is self-evident that a denial of First Amendment rights, where it exists, constitutes irreparable harm.

I recognize Mr. Young's argument that a Court should with great caution interfere in a Federal system with the requirements of obedience to State laws. I recognize that Mr. Davis is not being arbitrary and capricious when he requires obedience to the State laws. Indeed he is simply doing his duty. His duty is to prosecute those who violate the law.

Richmond Newspapers admits that they contemplate the violation of the law. I see an immediate threat of prosecution. I see no question but what the prosecution would be successful. And I see irreparable harm to Richmond Newspapers, Incorporated, in carrying out its duty to print the truth or whatever it conceives to be the truth and of the right of the people of Virginia to read at least Richmond Newspapers' version of the truth; because I don't know that there is any obligation that it be true.

I am going to issue the temporary restraining order. I do it with caution. I have considered the briefs that the parties have filed. I have attempted to study the law. I just lately read the Maynard case. There are some distinguishing features, of course, between Maynard and this case. But the distinguishing features don't apply, as I see it, to the principles involved. They apply only to the guise under which that case arose being somewhat different from the guise under which this case arose, but it seems to me the principles are the same.

The Court will require that bond be posted in the amount of $100, and the defendant will be enjoined from prosecuting the plaintiffs for disclosing matters pending before

the Virginia Judicial Inquiry and Review Commission in the ordinary course of its duties as a newspaper.

Counsel may prepare a draft order or injunction carrying out the terms of what the Court has indicated from the bench that it intends to do. And I see Mr. Wellford, ever confident of his success here today, has already prepared one. Is that correct, Mr. Wellford?

Mr. Wellford: I have a sketch here, Your Honor.

The Court: Has it been submitted to opposing counsel?

Mr. Wellford: Yes, sir.

The Court: Does opposing counsel have any remarks as to form?

Mr. Young: Yes, sir. I understand that it is to expire in 10 days.

The Court: So far as I know, that's the limit that the law permits.

Mr. Young: I would like to request that this be made and consolidated to preliminary injunction • • •

APPENDIX C

Order of May 12, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,

Plaintiff,

v.

AUBREY M. DAVIS, JR.,

Defendant.

ORDER EXTENDING TEMPORARY RESTRAINING ORDER

On motion of plaintiff, by counsel, and good cause having been shown, it is hereby ORDERED that the Order temporarily enjoining defendant from prosecuting plaintiff, previously entered by this Court, be, and it hereby is, continued in full force and effect until May 21, 1977, unless sooner modified, extended or dissolved.

ENTER:

12 May 1977

/s/ D. DORTCH WARRINER
U.S. District Judge

Appendix C

We ask for this:

/s/

.....
Of Counsel for Plaintiff

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK

By: /s/ SAMUEL I. GOLIGHTLY, JR.
SAMUEL I. GOLIGHTLY, JR.
DEPUTY CLERK

FILED IN OPEN COURT
May 12, 1977
CLERK, U.S. DIST. COURT

APPENDIX D

Order of May 20, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,
Plaintiff,

v.

AUBREY M. DAVIS, JR.,
Defendant.

ORDER

This cause came on to be heard on plaintiff's motion for a preliminary injunction; and the Court having considered the verified complaint, the stipulation of facts entered into by both parties, the exhibits admitted into evidence, the briefs of both parties, and having heard the arguments of counsel, and for the reasons, including findings of fact and conclusions of law, stated from the bench by the Court, it is

ORDERED that defendant be and he hereby is restrained and enjoined, pending the determination of this action or until further order of this Court, from prosecuting plaintiff, its agents, servants, employees and counsel, for any alleged violation of § 2.1-37.13 of the Code of Virginia.

Appendix D

This injunction becomes effective upon the posting of bond in the amount of $100.00 without surety.

ENTER:

20 May 1977

/s/ D. DORTCH WARRINER
U.S. District Judge

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK

By: /s/ SAMUEL I. GOLIGHTLY, JR.
SAMUEL I. GOLIGHTLY, JR.
DEPUTY CLERK

FILED
May 20, 1977
CLERK, U.S. DIST. COURT
RICHMOND, VA.

APPENDIX E

Transcript of May 20, 1977

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 77-0237-R

RICHMOND NEWSPAPERS, INC.,
a Virginia corporation,

Plaintiff,

vs.

AUBREY M. DAVIS, JR., individually and in his official capacity as the Commonwealth's Attorney for the City of Richmond,

Defendant.

EXCERPTS OF PROCEEDINGS

Richmond, Virginia

May 20, 1977

Before:

HONORABLE D. DORTCH WARRINER,
United States District Judge

Appendix E

Appearances:

CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
Counsel for Plaintiff

By: ALEXANDER WELLFORD, ESQUIRE,
JAMES W. TREDWAY, ESQUIRE, and
LESLIE W. MULLINS, ESQUIRE

ANTHONY F. TROY, ESQUIRE,
Attorney General of Virginia
Counsel for Defendant

By: D. PATRICK LACY, ESQUIRE, and
JOHN HARDIN YOUNG, ESQUIRE

Reported by:

Donald E. Brayboy,
Official Court Reporter

The Court: One of the most interesting aspects about this job is that nothing is ever simple. And if that were not so, I don't suppose it would be such a good job.

The Court has re-read *Juidice* and has re-read *Maynard* in light of the arguments that have been made.

Of course, the Court finds as facts all the facts set forth in the stipulation. The Court finds as a fact that with respect to the matter before the Court, there are no pending proceedings in the State court. I think that's agreed to in the stipulation.

The Court further finds as a fact that criminal prosecution of the plaintiff is imminent, both for past publications or divulgings, in the words of the statute, and for those that are contemplated in the future. The Court finds that

any such prosecution will be successful, regardless of the assertions of First Amendment rights by the plaintiff, then defendant, in such prosecution, and I don't think that there is any dispute about that.

With respect to irreparable harm, the Court does not find that there would be irreparable harm in the matter of the imposition of a fine, a thousand dollars, which is the maximum, nor indeed with the reasonably to be anticipated cumulative effect of thousand dollar fines. If the Court were to find that the fines were being imposed, $1,000 a day for each publication, maybe, since there are two newspapers, $2,000 a day, one for the News Leader, one for the Times Dispatch, then we might be entering the area of harassment for bad faith, and it would be an entirely different situation anyhow.

But I don't think we are faced with that. I don't think we have an unreasonable Commonwealth's Attorney or Attorney General. They have a duty, and that duty is to uphold the laws of the Commonwealth. We're not in the area of bad faith. And the irreparable harm does not lie from the existence of the probability of a fine. The irreparable harm lies in the fact that the Commonwealth of Virginia is a self-governing Commonwealth. As such, its citizenry has a duty and a right to know and to be informed with respect to their government. That's certainly far from being a profound statement, but it's one that I think is universally accepted, that they have a right and duty to be informed as to the affairs of their government, particularly where the matter involves the competence and honesty of their magistrates, their judges.

Now, this doesn't speak at all to the right of the Commonwealth to maintain confidentiality over appropriate

matters. That matter is not before the Court, and the Court makes no finding or ruling with respect to that.

Now, *Juidice* v. *Vail*, and *Wooley* v. *Maynard* were handed down by the Supreme Court within a month of each other. *Juidice* v. *Vail* was decided on the 22nd of March, 1977. *Wooley* v. *Maynard* was decided on the 20th of April, 1977. And neither mentions the other. It would have been helpful, perhaps, in *Wooley* v. *Maynard* had they distinguished *Juidice* v. *Vail*. But it may be that the Supreme Court felt no distinction was needed.

At the very beginning of *Juidice* v. *Vail*, the Supreme Court discussed jurisdiction. And they used the phrase "standing to sue." I suppose that there are distinctions between "standing to sue" and "jurisdiction."

But with respect to abstention, with respect to *Huffman* v. *Pursue*, there is a remarkable similarity between the two. And the Court pointed out in *Juidice* v. *Vail* that what we had there was a *Younger* case, a *Huffman* v. *Pursue* case. We had a pending State proceeding.

The plaintiff—I believe it was Ward who was the one that was finally admitted as a plaintiff—Ward was the subject of pending State proceedings at the time.

Reading from page 383 of the Lawyers' Edition Report, 51 Lawyers' Edition, 2d, 376:

> "Appellees Ward and Rabasco do have standing, since they are subject to pending proceedings in the State courts."

Since their standing is predicated on the existence of a pending and not merely a threatened proceeding, we deal with Appellant Younger's contentions. Their standing was based upon the fact that a threat was presented to them

in that pending proceeding which could affect their liberty. There was imminence of danger, just as it is in this case; the Court has found it to be in this case.

But when the question of intervention arises, it arises under the situation of a pending proceeding, not of a non-pending proceeding, such as we have in this case.

Juidice v. *Vail* is an example of the legal situation that this Court was recently confronted with in the matter that was discontinued by the parties when the Richmond Newspapers sought an injunction against the pending proceeding in the Richmond Circuit Court. And the Court, this Court, I think correctly, refused to issue an injunction because criminal proceedings were in progress at that time.

The same thing was true in *Juidice* v. *Vail*. Though standing existed, the Court's discretion to issue an injunction in *Juidice* v. *Vail* was measured against the need, the propriety, the right in a Federal system, the duty in a Federal system for a Federal court to issue an injunction with respect to pending criminal proceedings.

That, I think, is *Juidice* v. *Vail*. That, I think, shows that *Juidice* v. *Vail* is significant only insofar as it extends *Younger* to contempt proceedings. As I recollect, *Younger* was a criminal proceeding. *Huffman* was a civil quasi-criminal proceeding. *Juidice* is now a contempt proceeding. And in all of those, where there is a pending State proceeding, this Court is told, the Federal Courts are told, "Do not enjoin."

And, surely, I have no quarrel with that. But that's not the case the Court has before it. The Court has before it a case which does *not* involve a pending judicial proceeding.

And perhaps I should call attention to the fact that those plaintiffs in *Juidice* v. *Vail* who had completed the contempt proceeding and had paid their fine and had gotten out of jail were denied standing to sue. And, significantly, the Court said they did not allege the imminence of continued contempt proceedings against them.

The Court went on to note that Mr. Vail, who had a proceeding against him on account of the fact that he owed 500 and some odd dollars, $536, I think, had paid $250 against that judgment, that being a $250 fine for contempt, which was applied against the judgment, and thus still had some 280 some dollars against him for which he was subject to proceedings on a contempt all over again, didn't allege that such proceedings were imminent, and there was nothing in the record to indicate that they were imminent, and the District Court had not found that they were imminent.

Thus, again, the *Juidice* case is not the case we have before us because the Court has found on the basis of this case, the basis of competent evidence and stipulation, that criminal prosecution is imminent. Indeed, the Commonwealth has never denied that if the law is violated, they will prosecute. They have never denied that in the absence of the temporary restraining order they might well have prosecuted for the slip-up or whatever it was of early May.

So then we go to *Wooley* v. *Maynard*, which is a case, I think, in many respects similar to this, though, as counsel observed, both counsel for plaintiff and counsel for defendant, in response to questions from the Court, the cases may be distinguished.

In the *Wooley* case, the Chief Justice held that the principles of equitable restraint enunciated in *Younger*, the principles of comity, the principles of abstention, what-

Appendix E

ever word may be used, do not preclude a District Court from exercising jurisdiction.

And now I am going to refer to the syllabus in Law Week.

> "A. When a genuine threat of State prosecution exists"—which the Court finds exists here—"a litigant is entitled to resort to a Federal forum to seek redress for an alleged deprivation of Federal rights. And aside from *Younger* principles, they may seek such redress under Section 42, U.S.C. 1983, when the relief sought is wholely prospective, i.e., to preclude further prosecution under a statute alleged to violate Constitutional rights. Failure to seek State appellate review of criminal convictions does not bar relief in Federal Court."

Now, we have, I think, the obverse of that last sentence. Here we have the exercise by the plaintiff of its right to seek appellate review in the State courts. But there is no equitable principle that I can see that would say that one should be in a better position to seek Federal relief because he refused to appeal a State conviction over one who does appeal. One who continues to exercise his rights under State law ought not thereby to be deprived of resort to a Federal Court over one who abandons his rights under the State law. I see no equitable principle. I know of no legal principle that says that these two situations should be distinguished.

And indeed we have not before us an appeal from the conviction in the Circuit Court of Richmond in any event. We have before us resort to the Federal Court because of the imminence of other convictions, just as Mr. Maynard had.

Appendix E

> "C. The threat of repeated prosecutions in the future against both appellees"—in that case, the husband and the wife—"and the effect of such continuing threat on their ability to perform the ordinary tasks of life that require an automobile are sufficient to justify injunctive relief and, hence, the District Court was not limited to granting declaratory relief."

Well, in Maynard, Mr. Maynard's and Mrs. Maynard's ability to function as citizens in the State of New Hampshire was severely abridged if they didn't have a right to drive their automobile.

I do not agree with counsel's argument that they could move to Connecticut. Imagine someone saying to a Virginian that you can move to North Carolina. If that's the only way we can protect our Constitutional rights, then—well, I won't go any further on that.

The hampering that would be commensurate with the hampering that Mr. Maynard was subject to, the threat to his ability to perform the ordinary tasks of daily life is, I think, the prohibition upon the citizenry of the State from knowing the workings of their government.

Again, I want to emphasize that I don't have before me the right of the Commonwealth to require its employees, its servants, its agents to take oaths to maintain confidentiality. That is not before me. I make no ruling on that.

But the example that was mentioned in argument of a newspaper reporting the gross conduct of a judge on the bench and being unable to report to the citizenry that something was indeed being done about that gross conduct strikes at the heart of the citizenry's respect for the courts.

Appendix E

If it be known falsely by the citizenry that judges with impunity may conduct themselves arrogantly, tyranically, shamefully on the bench and that's reported in the press, and then a great silence follows, no indication of any reprisals, no indication of any inquiry, no indication that anyone even cares, then that set of facts alone would put the Judiciary into disrepute.

I am mindful of the argument that Mr. Rehnquist made in his dissent, that one is not publicizing "live free or die" when one has it on his license plate when everyone knows that you're required by law to have it on your license plate; and it doesn't indicate in any way your agreement or assent to that.

And if one knows that the newspapers are required by law not to print information about investigations into judges' improprieties, then one would not reasonably believe that the mere fact that they are not reading about it indicates that nothing is being done about it because they know that whatever is being done about it, if anything, cannot be publicized.

That is a good argument but it presumes that everyone knows the law, among other things, and that is a presumption that we are not able to indulge.

I think everyone does know that automobiles have to have license plates on them. But I am far from sure that everyone knows that in the Commonwealth of Virginia newspapers can't print the truth about disciplinary actions against judges. As a matter of fact, I doubt if many people would believe it if it was presented baldly to them like that. And, yet, that is, baldly, what we have.

So I find that the inconvenience to Mr. Maynard and Mrs. Maynard is matched, perhaps more than matched, by the loss to the citizens of Virginia of the opportunity

Appendix E

of knowing what disciplinary actions are contemplated, what investigations are being made, what is being done about bad judges. They have a right to know, and a deprivation of that right is surely as damaging to the body politic of Virginia as the inconvenience that was found in the Maynard case to warrant Federal intervention there.

The second aspect of the Maynard case that struck the majority of the Court as calling for intervention was the problem of forced propagandizing by Mr. Maynard. It was held by the Court that Mr. Maynard was, against his will, against his conscience, against his sense of ethics, against his religious belief, being required to propagandize that it is better to die than to live as a slave. And though I have no problem with that ideological maxim at all, Mr. Maynard did. And the Court, the Supreme Court of the United States, said that Mr. Maynard against his will was being required to espouse that cause.

I don't think we have as close a parallel there as we do in the first instance; that is, of the deprivation. It may be argued that where the newspaper fails to tell the truth; that is, fails to say anything, it is saying that there is no news in this area.

If a newspaper has an obligation to print all the news that's fit to print and it doesn't print certain news, then that is saying, I suppose, that that's because there is no news in that category of newsworthy events.

Surely it is newsworthy that a judge is being investigated. Surely it's newsworthy that a judge is being disciplined by reprimand, informal or otherwise. That's newsworthy. And if the newspaper doesn't print that news, then it can be said that it is printing the opposite; it is saying the opposite. And in that sense, the newspaper is being forced by the State not only to say something it

doesn't want to say but to say something that isn't true and thus is misleading the citizenry.

Again, I call attention to the Rehnquist dissent, which says that that is not a valid argument when the people know that the newspaper can't print the truth. But I submit that a knowledge of that law is not nearly as universal as the knowledge that you can't operate an automobile without a license tag.

Thus, I conclude under the law that we have a *Wooley* v. *Maynard* case; that considering the far greater implications of the First Amendment right of people to know about their judiciary over Mr. Maynard's individual right to cover up his sign, that we have before us all of the imperatives that the Chief Justice saw in Maynard's situation and more.

The issues in Maynard could be on the surface laughed at. It could be said that, "Some nut up in New Hampshire wants to put adhesive tape on his sign and he carries it all the way to the Supreme Court of the United States; isn't that ridiculous?" And yet I think that a reading of the opinion in the Maynard case would show that the issue is far more than putting adhesive tape over a license plate. The issue is the issue of the reach and depths of our First Amendment dedication to free speech.

Accordingly, I am going to issue a preliminary injunction that will continue until further order of the Court or until a final hearing on the merits, if counsel deem such a final hearing necessary. I am not aware in my recitation of findings of any disputed fact. I believe that all of the findings that I made are not only undisputed but are agreed to.

However, I think counsel might well re-examine the file and re-examine the Court's opinion in the case to be certain that that is so; and, if it is, a submission that the preliminary injunction should be made final so that you may proceed with a full record to the Court of Appeals. That would be in order.

The injunction, of course, would be against the prosecution or threat of prosecution of Richmond Newspapers, Incorporated, any of its agents, servants, employees or counsel for any alleged violations of Code of Virginia, Section 2.1-37.13 during the pendency of the injunction.

Before the injunction will be in force and effect, the plaintiff will have to post a bond in the amount of $100 or continue in effect the bond posted at the time of the entering of the temporary restraining order.

Is there any other matter the Court needs to attend to at this time?

Mr. Wellford: No, Your Honor.

Mr. Troy: No, Your Honor.

(Whereupon, at 12:34 p.m., the Court adjourned.)

Court Reporter's Certificate

I, Donald E. Brayboy, RPR, official court reporter for the United States District Court, Eastern District of Virginia, Richmond Division, do hereby certify that the foregoing transcript of excerpts of proceedings, numbering pages 1 through 17, inclusive, is a true, correct and complete transcript of excerpts of proceedings before The Honorable D. Dortch Warriner, United States District Judge, and heard May 20, 1977, at Richmond, Virginia.

Given under my hand this 23rd day of May 1977.

/s/ Donald E. Brayboy
Official Court Reporter